IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

FRIDAY, THE 2ND MARCH 2007 / 11TH PHALGUNA 1928

OP.No. 31671 of 1999(U)

PETITIONER:

M.K.BHASKARAN,
ASSISTANT GRADE III (DEPOT),
FOOD CORPORATION OF INDIA,
MULAMKUNNATHUKAVU,
THRISSUR.

BY ADV. SRI.P.M.MOHAMMED SHIRAZ

RESPONDENTS:
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1. **FOOD CORPORATION OF INDIA,**
   16-20, BARAKHAMBA LANE,
   HEADQUARTERS, NEW DELHI, REPRESENTED BY IT'S
   MANAGING DIRECTOR.

2. **THE ZONAL MANAGER,**
   FOOD CORPORATION OF INDIA, ZONAL OFFICE,
   2, HADDOWS ROAD, CHENNAI – 600 006.

3. **THE SENIOR REGIONAL MANAGER,**
   REGIONAL OFFICE,
   FOOD CORPORATION OF INDIA, TRIVANDRUM – 14.

BY ADV. SRI.T.P.M.IBRAHIM KHAN, SC, RAILWAYS

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 02/03/2007 ALONG WITH O.P.NO.1031 OF 2000, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P.NO.31671/1999 U

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE ORDER NO.115/78 ESTT.1 DATED 09/06/1978.**

EXT.P2: **COPY OF ORDER NO.A14 (13)/79 AG.III.D. DATED 12/10/1979.**

EXT.P3: **COPY OF REPRESENTATION DATED 17/06/1999.**

EXT.P4: **COPY OF REPRESENTATION DATED 21/10/1999.**

EXT.P5: **EXTRACT OF RELEVANT PORTIONS OF PROVISIONAL SENIORITY LIST OF ASSISTANT GRADE – IIII(D) AS ON 31/12/1986 OF FOOD CORPORATION OF INDIA, NORTH ZONE.**

1ST RESPONDENT'S EXHIBITS:

EXT.R1(A): **COPY OF THE CIRCULAR NO.29 OF 1990 (E.P.1-1/84 DTD. 20/08/1990 ISSUED ;BY THE RESPONDENT.**

EXT.R1(B): **COPY OF THE CIRCULAR NO.24 OF 1991 (EP-1(1)/84 DTD. 6/06/1991 ISSUED BY THE RESPONDENTS.**

EXT.R1(C): **COPY OF THE RELEVANT PORTION OF THE SENIORITY LIST (PAGE NO.61) DATED 31/03/1999 ISSUED BY THE RESPONDENT.**

EXT.R1(D): **COPY OF THE STAFF REGULATIONS 1971 NO.NIL DATED NIL ISSUED BY THE RESPONDENT.**

EXT.R1(E): **COPY OF THE ORDER NO.5(15) 99-SEN.CELL DATED 4-2-2000 ISSUED BY THE RESPONDENTS.**

/TRUE COPY/

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S.SIRI JAGAN, J.

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O.P.Nos.31671/1999 & 1031/2000

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Dated this the 2nd day of March, 2007

J U D G M E N T

The issue involved in these two original petitions relates to preparation of seniority list of Assistant Grade III in the Food Corporation of India (FCI). In FCI a quota is prescribed for promotion to the post of Assistant Grade III as between the promotees and direct recruits. 20 per cent of available vacancies are to be filled up by promotees and the balance 80 per cent vacancies are to be filled up by direct recruitment. The petitioners in these two original petitions were promoted as Assistant Grade III on 26.6.1971 and 8.6.1980. A provisional seniority list of Assistant Grade III was published in 1979, in which persons directly recruited subsequent to the promotion of the petitioners upto 1986, were shown above the petitioners in the seniority list. The petitioners

filed objections to the same, but the same were rejected, apparently, by Ext.R1(A) produced by the FCI along with their counter affidavit dated 2.6.2000. In the above circumstances, the petitioners have approached this court seeking the following reliefs:-

O.P.No.31671/1999

I. Issue a writ of mandamus or any other appropriate writ, order a[sic] Direction commanding respondents to reckon petitioner's seniority as Assistant Grade-III from 26-6-1978 and grant consequential benefits to the petitioner.

II. Direct 2nd respondent to finalise the seniority list of Assistant Grade-III (Depot) after considering Exhibit-P4 and P5 objections submitted by the petitioner and publish the list within a time limit fixed by this Honourable Court,

III. Grant interim stay of Time bound promotions and granting of selection grade to those persons who joined as Assistant Grade-III after 26/06/1978, pending finalisation of seniority list of Assistant Grade -III."

O.P.No.1031/2000

"I. Issue a writ of Mandamus or any other appropriate writ, order or Direction commanding respondents 1 to 3 to reckon Petitioner's seniority as Assistant Grade-III from 8-6-1979 and grant consequential benefits to the petitioner,

II. Direct 2nd respondent to finalise the seniority list of Assistant Grade-III (Depot) after considering Exhibit-P6 and P8 objections submitted by the petitioner and publish the list

within a time limit fixed by this Honourable Court,

III. Issue a writ of Certiorari or any other appropriate writ direction or order quashing Exhibit P7 order,

IV. Grant interim stay of Time bound promotions and granting of selection grade to those employees who joined as Assistant Grade-III after 08/06/1979, pending finalisation of seniority list of Assistant Grade-III."

2. The petitioners' contention is that in so far as there is no contention in the counter affidavit that the petitioners were promoted as Assistant Grade III in excess of the quota prescribed for promotees, they cannot be pushed down in the seniority list on the basis of Regulation 16(3) of the FCI (Staff) Regulations 1971, which has been done in the present case. They point out that the 32 persons mentioned in paragraph 7 of O.P.No.31671/1999 were recruited subsequent to the promotion of the petitioners as Assistant Grade III, that too, by *en masse* relaxation of the basic qualification prescribed for selection by direct recruitment, which is graduation. The petitioners point out that

respondents 4 and 5 in O.P.No.1031/2000 are persons recruited under the compassionate employment scheme in the place of their respective parent who were actually juniors to the petitioners in the service and it would be totally unjust that respondents 4 and 5 who were in school, when the petitioners were promoted as Assistant Grade III, should be placed above the petitioners in the seniority list. The petitioners therefore submit that without a finding that the petitioners were appointed in excess of the 20 per cent quota fixed for promotees, in the quota fixed for direct recruits, they cannot be pushed down either by resorting to Regulation 16(3) or otherwise. They would also refer to three decisions of the Supreme Court in N.K.Chauhan v. State of Gujarat (AIR 1977 SC 251), Direct Recruit Class II Engg. Officers' Assocn. v. State of Maharashtra (AIR 1990 SC 1607) and Suraj Parkash Gupta v. State of Jammu & Kashmir (AIR 2000 SC 2386) in support of their contention that such pushing down is not permissible under law.

3. Going by the counter affidavits filed by the FCI and respondents 4 and 5, I could not see any specific contention anywhere that the petitioners were actually promoted in excess of the quota prescribed for promotees by taking up the quota prescribed for direct recruits, except a vague statement that seniority has been fixed in accordance with Rule 16 of the FCI (Staff) Regulations, 1971.. But counsel for respondents 4 and 5 submits that prior to 1986, promotions were made without reference to the quota system at all.

4. I am afraid that even assuming that to be so, which in any case has not been proved by any material before me, the petitioners cannot be pushed down in the seniority list unless the respondents categorically aver and prove by adequate materials that the petitioners were in fact promoted against vacancies earmarked for direct recruits, their seniority cannot be allowed to be affected by the appointment of direct recruits who joined much later to their

appointment.

5. In this connection, I am satisfied that the decisions referred to by the learned counsel for the petitioners squarely support his contentions. In N.K.Chauhan's case (supra) in paragraph 40, the Supreme Court has held as follows:

> "40. This brief and quick survey of decided cases and the submissions, considered by us in the judicial crucible, yield the following conclusions, leaving aside the question of 'confirmation' in service which, in the Gujarat set-up, leaves our controversy untouched.
>
> (a) The quota system does not necessitate the adoption of the rotational rule in practical application. Many ways of working out 'quota' prescription can be devised of which rota is certainly one.
>
> (b) While laying down a quota when filling up vacancies in a cadre from more than one source, it is open to Government, subject to tests under Article 16, to choose 'a year' or other period or the vacancy by vacancy basis to work out the quota among the sources. But once the Court is satisfied, examining for constitutionality the method proposed, that there is no invalidity, administrative technology may have free play in choosing one or other of the familiar processes of implementing the quota rule. We, as Judges, cannot strike down the particular scheme because it is unpalatable to forensic taste.
>
> (c) Seniority, normally, is measured by length of continuous, officiating service – the actual is easily accepted as the legal. This does not preclude a different prescription, constitutionality tests being satisfied.

(d) A periodisation is needed in this case to settle rightly the relative claims of promotees and direct recruits. 1960-62 forms period A and 1963 onwards forms period B. Promotees regularly appointed during period A in excess of their quota, for want of direct recruits (reasonably sought but not secured and because tarrying longer would injure the administration) can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods.

(e) Promotees who have been fitted into vacancies beyond their quota during the period B – the year being regarded as the unit – must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down, rather be pushed down as against direct recruits who were later but regularly appointed within their quota."

In the constitution Bench decision of *Direct Recruit Class II Engg. Officers' Assocn. v. State of Maharashtra* (supra) in paragraph 44 the court summed up the ratio of their decision as follows:

"44. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with

the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful

consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position."

In paragraphs 78 and 79 of the decision in Suraj Parkash Gupta's case (supra) the Supreme Court has held as follows:

"Direct recruits cannot claim appointment from date of vacancy in quota before their selection:

78. We have next to refer to one other contention raised by the respondent-direct recruits. They claimed that the direct recruitment appointment can be ante-dated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitting that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under direct recruitment quota.

79. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of regular appointment. He cannot claim seniority from a date when he was not born(e) in the service. This principle is well settled. In N.K.Chauhan v. State of Gujarat (1977) 1 SCC 308 (at p.321): AIR 1977 SC 251 at P.259: 1977 Lab IC 38 at p.46), Krishna Iyer, J. stated:

"later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service."

Again in A.Janardhana v. Union of India, (1983) 2 SCR 936: (AIR 1983 SC 769: 1983 LAB IC 849) it was held that a latter direct recruit cannot claim seniority from a date before his birth in service or when he was

> in school or college. Similarly it was pointed out in A.N.Pathak v. Secretary to the Government, 1987 Suppl.SCC 763 (at p.767): (AIR 1987 SC 716 at p.718: 1987 Lab IC 638 at P.651) that slots cannot be kept reserved for the direct recruits for retrospective appointments."

Although in the earlier decisions the Supreme Court held that unless the promotees have been regularly appointed in excess of their quota for want of direct recruits, the promotees cannot be pushed down in seniority, in the above decisions particularly in Suraj Parkash Gupta's case (supra) the Supreme Court went further and held that a direct recruit can claim seniority only from the date of his regular appointment and he cannot claim seniority from a date when he was not borne in service and that the slots for direct recruits cannot be kept reserved for retrospective appointment.

6. Therefore, on all counts, the petitioners have been unjustly treated in the matter of fixation of their seniority. That being so, I am satisfied that they are entitled to the reliefs prayed for by them in the original petitions.

Accordingly, there would be a direction to respondents 1 to 3 to rework the seniority of the petitioners giving them slots in the seniority list applicable to persons who became Assistant Grade III on 26.6.1979 and 8.6.1980 respectively irrespective of the channel of appointment. Orders in this regard shall be passed by the 2nd respondent within a period of two months from the date of receipt of a copy of this judgment.

Original petitions are allowed as above.

Interlocutory applications stand closed.

sdk+ S.SIRI JAGAN, JUDGE

S.SIRI JAGAN, J.

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J U D G M E N T

2nd March, 2007